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QUESTION PRESENTED

Whether the state courts have been divested of their presumptive jurisdiction to hear civil claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68, by "an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between the state-court jurisdiction and federal interests." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1650

FRANCINE TAFFLIN, *et al.*,
Petitioners,

v.

JEFFREY A. LEVITT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS

COUNTERSTATEMENT

This case arises out of "Maryland's savings and loan crisis, the steps taken by the Governor of Maryland and the General Assembly of Maryland to meet it, and the implementation of the legislative scheme by the designation of a single judge of the Circuit Court for Baltimore City to adjudicate all claims arising out of the conservator/receivership proceedings for failed savings and loan associations . . . ." (Pet. App. A-4—A-5.) [1] The Fourth Circuit discussed the factual background of the litigation in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), a related case upon which it relied in concluding that the facts of this case presented a compelling case for federal

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[1] All citations to the Appendix to the Petition ("Pet. App.") are to the opinions below.

court abstention. We can do no better than reproduce the Fourth Circuit's account as set forth in *Brandenburg*:

"The Maryland Savings-Share Insurance Corporation (MSSIC) was a quasi-public non-profit corporation established by the Maryland legislature in 1962 to insure accounts in state-chartered savings and loan associations. MSSIC was given substantial regulatory control over its member institutions, which by 1985 numbered approximately 100. In May 1985, rumors of financial instability at two savings and loans insured by MSSIC—Old Court and Merritt—triggered a general run on MSSIC-insured thrifts. The resulting panic threw MSSIC itself into financial peril and threatened to lead to the collapse of the state's savings and loan industry. In response, the Governor of Maryland declared a state of public crisis, issued an Executive Order limiting withdrawals from all MSSIC-insured institutions to a maximum of $1,000 per account per month, and called the Maryland General Assembly into emergency session. In special sessions held in May and October-November of 1985, the General Assembly passed a package of legislation designed to deal comprehensively with the crisis in the state's savings and loan industry. . . .

"This legislative effort had two principal components. First was the creation of a state-operated deposit insurance fund, the Maryland Deposit Insurance Fund (MDIF), to replace the ruined MSSIC. MDIF was given all of MSSIC's powers, duties, and responsibilities and assumed all of its assets and liabilities, including its insurance obligations to depositors at member institutions. Second . . . was the establishment of a comprehensive framework for the administration of conservatorship and receivership proceedings for insolvent savings and loan associations. *See* Md. Fin. Inst. Code Ann. §§ 9-701 to 9-712. Section 9-709 gave MDIF the right to be appointed conservator or receiver of any savings and loan association insured by it. Section 9-710 gave the state

court administering the conservatorship or receivership of such an institution 'exclusive and plenary jurisdiction over all claims, actions, and proceedings that are brought by any person and that are related to the assets, property, powers, rights, privileges, duties and liabilities' of that institution or of MDIF in its capacity as conservator or receiver. To implement this comprehensive scheme, the Maryland Court of Appeals appointed a single judge . . . to adjudicate all claims arising out of the conservatorship/receivership proceedings for the failed savings and loan associations." 859 F.2d at 1181-82 (citations and footnotes omitted).

In accordance with the framework for addressing the crisis established by the Maryland legislature, Old Court Savings & Loan, Inc., was placed in receivership, with the state agency, MDIF, acting as receiver. As receiver, MDIF brought state court actions against each of the defendants below, respondents here, "alleging misdeeds closely paralleling those alleged in the instant case." (Pet. App. A-5.) In these state court actions, MDIF sought to recover from potentially liable and responsible parties sums that ultimately would be distributed through MDIF to reimburse Old Court's depositors, including petitioners. *See Brandenburg*, 859 F.2d at 1192. Through MDIF, the State of Maryland has assured all depositors, including petitioners, that it will repay the entire principal amount of their accounts, up to the insured limit of $100,000 per account. MDIF has announced, however, that Old Court depositors will not be compensated for interest accruing after November 8, 1985, and that interest for the period May 13 to November 8, 1985, will be paid only at reduced rates. (Pet. App. A-5.) Petitioners' damage claims are based on this reduction of interest on their deposits.

Notwithstanding the state's systematic efforts to address the crisis, petitioners filed these actions in federal court on January 7, 1986, asserting, among other claims, a claim under the Racketeer Influenced and Corrupt

Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq.* Petitioners named as defendants the former officers and directors of Old Court, the former officers and directors of MSSIC, the law firm of Venable, Baetjer & Howard (counsel to MSSIC and Old Court), Old Court's accounting firm, and MDIF itself.[2] (Pet. App. A-4.)

The district court granted defendants' motions to dismiss, holding that it should abstain from reaching petitioners' RICO claims in deference to the state court proceedings.[3] The district court concluded that state courts presumptively possess jurisdiction over federal claims, and that "the RICO claims in the present suit are essentially state fraud claims," which the state courts were fully qualified to handle. (Pet. App. A-28.) The district court reasoned that the state courts were in a position comprehensively to address all of petitioners' claims:

> In the present case MDIF, Old Court's receiver, in accordance with the emergency legislation, has brought law suits in state court against the directors of Old Court and more recently against the former directors of MSSIC. Thus, a large number of Defendants in this case are Defendants in the state court suits filed by MDIF. If the Plaintiffs are allowed to proceed in this action, they will have circumvented the receivership process. Moreover, any money awarded to Plaintiffs would potentially reduce the available funds to satisfy a judgment in favor of depositors in the receiver proceeding.

(Pet. App. A-26 - A-27.)

[2] At an early stage of the action, MDIF was dismissed as a defendant by the district court on Eleventh Amendment grounds. (Pet. App. A-4.) MDIF nevertheless retains a significant interest in this case to the extent the case involves claims against Old Court, which is under MDIF's receivership, and against MSSIC, MDIF's predecessor.

[3] Petitioners also asserted a claim under Section 10b of the Securities Exchange Act, 15 U.S.C. § 78j(b). The district court, following *Marine Bank v. Weaver*, 455 U.S. 551 (1982), dismissed that claim on the ground that the certificates of deposit upon which plaintiffs premised their Exchange Act claim were not a form of "security" covered by that Act. (Pet. App. A-24.) The Fourth Circuit affirmed this dismissal (Pet. App. A-6—A-9), and this Court subsequently denied certiorari on the issue.

The Court of Appeals affirmed. The court relied on its prior decision in *Brandenburg* in holding (1) that the state court would have jurisdiction over the RICO claims and (2) that Maryland's " 'comprehensive scheme for the rehabilitation and liquidation of insolvent state-chartered savings and loan associations' . . . provided a proper basis for the district court to abstain under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)." (Pet. App. A-10, *quoting Brandenburg*, 859 F.2d at 1191.)

In *Brandenburg*, the Court of Appeals had concluded that to allow a parallel federal court action to proceed would undermine the state courts' efforts to achieve a fair and equitable distribution of limited savings and loan assets in two ways: *First*, it would interfere with MDIF's efforts "to marshal the institution's assets for distribution to its depositors and other creditors according to the statutory priority scheme . . . . Allowing the plaintiffs to proceed with this action would permit them to circumvent that statutory distribution scheme by reaching assets of [the association] in the hands of third parties, before the receiver can recover them for the institution's estate." 859 F.2d at 1191-92. *Second*, the federal action would undermine the orders issued by the state receivership court. Because the damages claimed in the federal action consist of interest which the receivership court relieved the savings and loan of the obligation to repay, the "action is thus in effect a collateral attack on the interest-freezing orders issued by the state receivership court . . . ." *Id.* at 92.

On the question whether the state courts could hear petitioners' RICO claims, *Brandenburg* relied upon "the well-established presumption that state courts may assume jurisdiction over cases arising under federal law." 859 F.2d at 1193. That presumption could only be "re-

butted in three ways: 'by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.'" *Id.*, *quoting Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981). The court analyzed each of these factors with respect to RICO and concluded that "the state and federal courts share concurrent jurisdiction over civil RICO claims." *Id.* at 1195.[4]

This Court granted certiorari limited to the question of whether state courts may hear civil RICO claims.

SUMMARY OF ARGUMENT

The concurrent sovereignty of the states, subject only to the limitations imposed by the Supremacy Clause, is a cornerstone of our federal system. Within this system, state courts possess inherent authority to hear federal claims. The question of concurrent jurisdiction, therefore, is not whether Congress has affirmatively granted jurisdiction to the state courts—for the general jurisdiction of the state courts is not defined by Congress, but by their own legislatures. The question is whether Congress has exercised its power to eliminate that jurisdiction. Except in an extremely limited class of cases, where concerns of federal sovereignty dominate, only Congress can

[4] At the time the decision below was rendered, the federal appellate courts and the highest state courts that had considered the issue were unanimous in holding that state courts are competent to hear civil RICO claims. *See Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987); *Simpson Elec. Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, 530 N.E.2d 860, 534 N.Y.S.2d 152 (1988); *Rice v. Janovich*, 109 Wash.2d 48, 742 P.2d 1230 (1987); *Cianci v. Superior Court*, 40 Cal.3d 903, 710 P.2d 375, 221 Cal. Rptr. 575 (1985). *See also County of Cook v. MidCon Corp.*, 773 F.2d 892 (7th Cir. 1985) (suggesting in dicta that RICO jurisdiction is concurrent). Following the decision below, the Sixth Circuit rendered its decision in *Chivas Products Ltd. v. Owen*, 864 F.2d 1280 (6th Cir. 1988), reaching a contrary result and creating a conflict in the circuits.

divest the state courts of their inherent authority over federal claims.

In *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981), this Court, following a consistent line of cases, including *Claflin v. Houseman*, 93 U.S. 130 (1876), and *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), held that "the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." None of these factors is present with respect to civil claims arising under RICO.

First, as all courts that have considered the issue have agreed, and as petitioners concede, the text of RICO, which provides merely that private actions "may" be prosecuted in the federal courts, does nothing to divest the state courts of jurisdiction. "[I]t is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from jurisdiction over the cause of action." *Gulf Offshore*, 453 U.S. at 479 (citation omitted).

Second, as all courts that have considered the issue have also agreed, RICO's legislative history contains no indication that Congress even considered eliminating state court jurisdiction over RICO claims, much less that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts. Since it requires an affirmative act of Congress to withdraw jurisdiction from the state courts, Congress' failure to consider the issue is conclusive. Contrary to petitioners' suggestion, this Court has no role to play in assessing what Congress "would have" intended had it thought about the issue.

Finally, nothing in either the nature or the underlying policies of civil RICO actions is incompatible with state court jurisdiction. "Incompatibility" has generally been limited to situations where state court jurisdiction

over the federal claim would undermine federal sovereignty in one of two specific ways. Incompatibility may arise from principles of federal sovereign immunity when the United States or one of its agents is called upon to account for its actions in a state court. Alternatively, incompatibility may be found where state court jurisdiction presents a direct conflict with the structure of a federal statutory scheme (as when Congress assigns the administration of a federal law to a specialized tribunal). Neither consideration is present with respect to RICO. On the contrary, concurrent jurisdiction is particularly appropriate for RICO claims. RICO's underlying structure incorporates and supplements state law, and RICO's broad remedial purposes would be promoted by providing alternative fora in which persons injured by racketeering activity may bring their claims for damages.

Neither do the more general policy arguments urged by petitioners—concerning the desirability of uniformity of decision and the asserted unfamiliarity of state judges with the federal crimes comprising some of RICO's predicate acts—suggest any "disabling incompatibility" between RICO and state court adjudication. *First*, the desirability of uniformity of decision is no greater with respect to RICO than it is for any other federal statute. Nothing in RICO's text, structure, or legislative history suggests that there is anything special about RICO in this regard. *Second*, the fact that civil RICO incorporates standards from federal criminal law does not render state courts incompetent to hear civil RICO claims. It is no more anomalous for state courts to interpret RICO's federal law predicate acts than it is for federal courts to interpret RICO's state law predicate acts. *Third*, it would be wholly incongruous to hold that RICO claims cannot be pursued in state court but can be pursued before arbitral panels as this Court recently held in *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2345 (1987). Far from being "inimical" to state court jurisdiction, RICO's purposes are promoted by allowing state courts to hear civil claims brought under the Act.

ARGUMENT

I. STATE COURTS POSSESS INHERENT POWER TO ADJUDICATE FEDERAL CLAIMS UNLESS (1) CONGRESS ACTS TO STRIP THEM OF THAT JURISDICTION, OR (2) THERE IS SOME DISABLING INCOMPATIBILITY BETWEEN THE FEDERAL CLAIM AND STATE COURT ADJUDICATION.

A. State Courts Possess Inherent Authority To Adjudicate Federal Claims.

As an incident to the power granted to them by their own constitutions and legislatures, state courts of general jurisdiction have the authority to adjudicate claims arising under the laws of another sovereign. Each state has "complete and exclusive jurisdiction by its judicial tribunals over all legal questions, of whatsoever nature, capable of judicial determination, and involved in any case within its limits between parties over whom it could exercise jurisdiction." *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 517 (1898). Since before the adoption of the Constitution, state courts have been empowered to adjudicate claims arising under foreign law as well as claims arising under local law. Thus, state courts are presumptively as competent to adjudicate claims arising under the laws of the United States—the law of a superior sovereign—as they are to adjudicate claims arising under the laws of Japan, Brazil or Saudi Arabia.[5]

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[5] There is nothing obscure about this principle:

> Since 1789, rights derived from federal law could be enforced in state courts unless Congress confined their enforcement to the federal courts. This has been so precisely for the same reason that rights created by the British Parliament or the Legislature of Vermont could be enforced in New York courts. Neither Congress nor the British Parliament nor the Vermont Legislature has power to confer jurisdiction upon the New York courts. But the jurisdiction conferred upon them by the only authority that has jurisdiction upon them—namely the lawmaking power of the State of New York—enables them

1. It was no part of the constitutional plan to alter this fundamental aspect of state sovereignty. The grant of power to the federal government to establish a federal judiciary did not imply any limitation on the power of the states to define the jurisdiction of their own courts. "Nothing more was done by the Constitution than to extend the judicial power of the United States to specified cases and controversies; leaving to Congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise jurisdiction concurrent with the courts of the several States." *Plaquemines*, 170 U.S. at 517. To be sure, the Supremacy Clause requires the ultimate precedence of the federal Constitution and federal law. But "nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law." *Dowd Box*, 368 U.S. at 507.

2. The presumptive jurisdiction of state courts over federal claims is confirmed by the fact that Article III did not require the establishment of federal trial courts. Rather than mandate inferior federal courts, the Framers let Congress decide whether and to what extent to vest the federal judicial power in a federal judiciary. This fact reflected the Framers' view of the state courts as the principal, or at least ordinary, tribunals for the adjudication of federal rights. Thus, the premise of the Framers' determination that federal courts were not to be required was that, should Congress create a federal right, "the state courts stand ready to vindicate the federal right . . . ." *Gulf Offshore*, 453 U.S. at 478 n.4.

3. This basic understanding of the state courts' inherent authority to adjudicate federal claims was concisely

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to enforce rights no matter what the legislative source of the right may be.

Brown v. Gerdes, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring).

described by Alexander Hamilton in *The Federalist No. 82*. In terms that have been reflected in this Court's own repeated reaffirmations of the principle, Hamilton asserted that

> in every case in which [state courts] were not excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as part of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.

Id. at 536 (Modern Library ed. 1937). Over a span of two centuries, this Court has adhered to Hamilton's statement of the rule of concurrent state court jurisdiction. *See, e.g., Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 25-26 (1820) ("in every case in which the state tribunals should not be expressly excluded by the acts of the national legislature, they would, of course, take cognisance of the causes to which those acts might give birth"); *Claflin*, 93 U.S. at 136 ("if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it"); *Dowd Box*, 368 U.S. at 507-08; *Gulf Offshore*, 453 U.S. at 477-78.

In sum, state courts do *not* depend upon an affirmative grant of authority from Congress in order to hear fed-

eral claims. On the contrary, state courts possess the inherent authority to hear such claims as long as their own state constitution and state legislature grant them such power. *Claflin*, 93 U.S. at 136-37.[6]

B. The Supremacy Clause Grants Congress The Ability To Oust The State Courts Of Their Jurisdiction And Defines The Limited Contexts In Which State Court Jurisdiction May Be Incompatible With A Federal Claim.

1. The Supremacy Clause confirms the prerogative of the state courts to decide questions involving federal rights. In binding "The Judges of every State" to the supremacy of federal law, the Framers clearly contemplated that state courts would enforce rights derived from federal law. The Supremacy Clause specifies that federal law is to be regarded as not *merely* the law of another sovereign, but of a higher sovereign. Therefore, while state courts, possessing jurisdiction to entertain claims based on Japanese, English, or Saudi law, are free to reject foreign law when it conflicts with the law or policy of the state itself, the state courts are bound to apply federal law "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (Art. VI, § 2).

2. The Supremacy Clause also suggests the limited circumstances in which the state courts may *not* hear federal claims. The Supremacy Clause provides the mechanism through which Congress may, by affirmative enactment, oust the state courts of jurisdiction over a given federal claim.[7] Thus, it has long been acknowledged

[6] This case presents no issue about the ability of the states to *decline* to exercise jurisdiction over federal claims or of the power of Congress to *compel* them to entertain such claims.

[7] Of course, the ultimate source of Congress' power to limit the jurisdiction of the state courts might be found in Congress' authority "[t]o make all laws which shall be necessary and proper for carrying into execution" its enumerated powers. *See Tennessee v. Davis*, 100 U.S. 257, 263-64 (1880). Nevertheless, it is by virtue of the Supremacy Clause that state courts must heed any such jurisdictional limitation over federal law claims. *See Claflin*, 93 U.S. at 137.

that "Congress may, if it see[s] fit, give to the Federal courts exclusive jurisdiction." *Claflin*, 93 U.S. at 137 (citations omitted). *See also Houston v. Moore*, 18 U.S. (5 Wheat.) at 25-26. Indeed, from the outset of the Republic, Congress has carefully prescribed that some of the jurisdiction in the lower federal courts be "exclusive[] of the courts of the several States" (*see* Act of Sept. 24, 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76, 78), knowing full well the language to use when it seeks to vest exclusive jurisdiction in the federal courts. *See, e.g.*, 28 U.S.C. §§ 1333, 1338(a), 1346(b), 1351, 1355, 1356; 15 U.S.C. § 78aa; 18 U.S.C. § 3231; 40 U.S.C. § 270b(b). Accordingly, this Court has held that state courts are divested of jurisdiction over a federal claim where Congress has made such an intention clear, by either "an explicit statutory directive" or an "unmistakable implication from legislative history." *Gulf Offshore*, 453 U.S. at 478.

3. Beyond empowering Congress to pass a law barring the state courts from assuming jurisdiction over a federal claim, the Supremacy Clause suggests two additional, albeit narrow, situations in which the state courts may not hear a federal claim. *First*, where the state courts' exercise of jurisdiction over the federal claim would effectively subject the federal government itself to the jurisdiction of the state courts, that assertion of jurisdiction would appear to be an affront to federal sovereignty and sovereign immunity. In that circumstance, the National government's own sovereign immunity (and the historic principle that a superior sovereign cannot be dragged unwillingly before the courts of a subordinate government) provide a narrow exception to the rule that the states have presumptive jurisdiction over *all* federal

claims. *Second*, under the Supremacy Clause, the states have no power to take any action that conflicts with or frustrates the implementation of a federal statute. Thus, in those rare instances where the mere exercise of jurisdiction by the state courts, even though applying the same substantive law, would defeat the purposes of some carefully crafted remedial mechanism for the expert, expedited, or focused adjudication of federal rights, the exercise of state court jurisdiction could properly be said to be inconsistent with the federal right. In these limited contexts, this Court has recognized that there may exist a "disabling incompatibility between the federal claim and state-court adjudication." *Gulf Offshore*, 453 U.S. at 477-78. *See also Dowd Box*, 368 U.S. at 507-08; *Claflin*, 93 U.S. at 136.

II. CONGRESS HAS NOT OUSTED THE STATE COURTS OF JURISDICTION OVER RICO CLAIMS.

There is no dispute about the appropriate standard for deciding the question presented by this case: petitioners agree (Pet. Br. 10) that the state courts can be divested of jurisdiction over RICO only "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore*, 453 U.S. at 478, *citing Dowd Box*, 368 U.S. at 507-08, *Claflin*, 93 U.S. at 137. Yet, while petitioners acknowledge these standards, in their application petitioners tend to forget their provenance. Thus, petitioners proceed as if this Court were free to impute purposes to Congress that Congress never expressed, or to impose upon the resolution of the instant issue any number of asserted federal policies bearing little or no relationship to the statute in question. Petitioners' policy-oriented approach would undermine the historical rationale for the principle of concurrent jurisdiction.

The "presumption" of concurrent jurisdiction to which the cases of this Court refer is *not* a mere presumption

of policy. To illustrate: Where a statute is silent with respect to some issue that arises in the course of its administration, then the courts may be called upon to fill in the gaps that Congress left in the statute. It may be proper, in that circumstance, for a court to ask what Congress would have done had it considered the issue. In answering that question, the courts might employ a presumption—reflecting some overriding consideration of policy—that provides a guide to the presumed intention of Congress in enacting a statute.[8]

But the "presumption" of concurrent jurisdiction is built upon more than a constitutional "policy" of respect for the state courts. It states a juridical fact: under our federal system, the state courts possess jurisdiction over federal claims, unless and until Congress acts to take it away. Only where Congress has enacted some law directed to that purpose can it properly be said that the state courts have been stripped of their inherent authority. The issue for the Court is not, therefore, what Congress would have done had it considered the question, but only what Congress did: Did it pass a law changing the *status quo*, ousting the state courts of their existing jurisdiction? In answering that question, the Court should not lightly infer that Congress has acted to deprive the states of a fundamental sovereign authority that the Framers carefully left undisturbed.

Similarly, in determining whether there is some "disabling incompatibility" between state court jurisdiction and the achievement of a federal statute's goals, it is only proper to bear in mind the constitutional source of the "incompatibility" rule. Only where it can fairly be said that the Constitution, through the Supremacy Clause,

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[8] For example, where a statute does not contain a statute of limitations, the Court may make reference to the policy against stale claims and presume that Congress intended the federal courts to supply a limitations period. *See Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143 (1987).

compels such a result, may a finding of incompatibility be made. The issue is not one of policy for this Court to weigh. "Disabling incompatibility" exists only where state court jurisdiction undermines the superior sovereignty of the federal government or frustrates the remedial provisions of a federal statute.

A. The Statute States No Bar To State Court Jurisdiction Over RICO.

Petitioners concede, as they must, that there is nothing in the language of RICO—much less "an explicit statutory directive" (*Gulf Offshore*, 453 U.S. at 478)—to suggest that Congress has, by affirmative enactment, divested the state courts of the power to adjudicate claims under the Act. (*See* Pet. Br. 10.) Because Congress could so easily have used words that would clearly communicate its intention to vest jurisdiction exclusively in the federal courts,[9] the absence of language expressly divesting the state courts of jurisdiction is nearly dispositive of this case.

RICO grants "any person" injured by a violation of its substantive provisions the right to bring an action in the federal courts: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter *may sue* therefor in any appropriate United States district court . . . ." 18 U.S.C. § 1964(c) (emphasis added). Such language "provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be." *Dowd Box*, 368 U.S. at 506. This Court has repeatedly held that a statute that uses the word "may" in conferring jurisdiction of a federal claim on a federal court "does not state or even suggest that such jurisdiction shall be exclusive." *Id.* at 506. *See Gulf Offshore*, 453 U.S. at 479 ("It is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action"); *United States v. Bank of New York Co.*, 296 U.S. 463, 479 (1936).

[9] Congress is well aware, of course, of the language that it can use in a statute to divest the state courts of jurisdiction: Nothing more is required than to say that "the district courts of the United States shall have exclusive jurisdiction over all civil actions arising under" the statute. Congress has used this or similar language on scores of occasions both before and after its enactment of RICO. *See* page 13 *supra*.

To suggest that a permissive grant of jurisdiction to the federal courts should divest the jurisdiction of the state courts is to "disregard th[e] consistent history of hospitable acceptance of concurrent jurisdiction" by this Court. *Dowd Box*, 368 U.S. at 508. If Congress is to revoke state court jurisdiction, it must use words that do more than merely permit a claim to be brought in federal court. Like § 301(a) of the Labor Management Relations Act at issue in *Dowd Box*, or the jurisdictional provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(b), considered in *Gulf Offshore*, that is all the language of RICO § 1964(c) does.

B. RICO's Legislative History Provides No Indication That Congress Intended *Sub Silentio* To Deprive The State Courts Of Jurisdiction Over RICO Claims.

Although Congress can only strip the state courts of jurisdiction by affirmative enactment—a requirement that would seem to call for an "explicit statutory directive" (*Gulf Offshore*, 453 U.S. at 478)—the Court has allowed that Congress' intention to divest the state courts of jurisdiction may be shown by "unmistakable implication from legislative history" (*id.*), even where Congress has neglected to be "explicit." Although petitioners rely heavily on this theory, there is literally nothing in RICO's legislative history, let alone an "unmistakable implication," to support the conclusion that Congress intended to oust the state courts of jurisdiction over RICO.

1. Every court that has addressed this issue has concluded that RICO's "legislative history contains no indication that Congress ever expressly considered the question of concurrent jurisdiction." *Brandenburg*, 859 F.2d at 1193.[10] As Professor Blakey has confirmed, "'There is nothing on the face of the statute or in the legislative history' that touches on the question of concurrent jurisdiction . . . . 'To my knowledge, no one even thought of the issue.'" Flaherty, *Two States Lay Claim to RICO*, Nat. L.J., May 7, 1984, at 3, col. 2 (quoting Professor Blakey).[11]

2. The fact that Congress did not even *consider* the issue of state court jurisdiction over civil RICO claims should (absent some disabling incompatibility, *see* II.C *infra*) end the inquiry. It is not for the federal courts "to amend a statute so as to provide for circumstances that Congress has overlooked," (*Lou*, 834 F.2d at 736 n.4) especially where to do so would be to intrude not only upon the prerogative of Congress, but upon the prerogative of the states and their legislatures to define

[10] As the Ninth Circuit observed, "[t]he legislative history provides 'no evidence that Congress ever expressly considered the question of jurisdiction; indeed, the evidence establishes that its attention was focused solely on whether to provide a private right of action.'" *Lou*, 834 F.2d at 736, *quoting Cianci*, 710 F.2d at 379. *See also Chivas Products*, 864 F.2d at 1283.

[11] Professor Blakey was a staff member who played a role in drafting the legislation. A few courts have placed great reliance on his statement that while Congress never even thought of the issue whether jurisdiction over the private right of action should be exclusively federal, if Congress had thought of it, Congress would have concluded that it should be. *See, e.g., Greenview Trading v. Hershman & Leicher*, 489 N.Y.S.2d 502, 505 (App. Div. 1985). We know of no case, however, where this Court has relied on even the on-the-record, post-hoc statements of sitting Congressmen and Senators about what Congress would have done if it had thought of an issue. We feel certain that this Court has never relied on the post-hoc surmise of a congressional staff member, no matter how influential he may have been in the drafting process.

the jurisdiction of their courts as they see fit. This Court cannot enact a statute for Congress that Congress did not enact itself. Once it is conceded that Congress did not even think of the issue, then it is clear that Congress has not, *in fact*, enacted a statute that divests the state courts of jurisdiction over RICO claims. Put another way, it is precisely where a statute and its legislative history are silent that the presumption of state court jurisdiction should be determinative.

3. Not only does RICO's legislative history fail to evince an "unmistakable implication" that Congress intended to divest the state courts of jurisdiction, but to the extent the statute itself has anything to say on the issue, it buttresses a finding of concurrent jurisdiction. Congress expressly directed that RICO "be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970). This Court has emphasized that, "if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 492 n.10 (1985). These remedial purposes would be impeded by restricting the tribunals to which a RICO plaintiff may turn for relief. Congress intended to expand, not to limit, plaintiffs' remedial options.

4. This Court has not lightly inferred a congressional intent to deny jurisdiction to the state courts—even where the legislative history of a statute demonstrates Congress' concern that state courts might not properly adjudicate the federal rights at stake, and where there are strong indications that Congress had, in fact, specifically acted in a field in order to make a *federal* forum available to suitors. With what is now codified at 42 U.S.C. § 1983, Congress created a cause of action that is, arguably, uniquely federal in that it protects individuals from misconduct by state officials. The history of that enactment also shows a clear congressional focus on the

provision of a *federal* forum for the vindication of federal rights and grave concern about the willingness of the state courts properly to adjudicate federal rights. *See Mitchum v. Foster*, 407 U.S. 225, 239-42 (1972). Nonetheless, even in connection with that statute, this Court has refused to read the grant of a right to bring an action in federal court as a denial of jurisdiction to the state courts. *See Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980); *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980). On the basis of RICO's silent legislative record, it would be odd indeed to conclude that while Congress did not object to state court jurisdiction over Section 1983, it nonetheless intended to divest the state courts of jurisdiction over civil RICO.

5. Faced with silence both in the statute and its legislative history, petitioners argue that the similarity of § 1964(c) to Section 4 of the Clayton Act, 15 U.S.C. § 15(a), coupled with legislative history indicating that Congress modeled RICO's civil remedy after the Clayton Act's civil remedy provision, provides a sufficient basis for inferring that Congress intended jurisdiction over RICO claims to be exclusively federal. The mere modeling of one statute's remedial provisions after those of another statute does not imply, and certainly does not "unmistakably imply," that Congress intended actions brought under the later statute to be confined to the courts in which actions under the earlier statute are to be brought.

a. While the drafters of Section 1964(c) found precedent for RICO's treble damages and attorneys' fees provisions in the Clayton Act, the "mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language." *Lou*, 834 F.2d at 737. As noted above, there is no evidence in the legislative history that Congress either considered or assumed that there were any *jurisdictional* implications associated with importing remedial language from the Clayton Act into RICO. This Court has never held that a mere similarity in language between two statutes is a sufficient indicator of congressional intent to overcome the bedrock rule of concurrent state court jurisdiction.[12]

It would be particularly inappropriate to draw such a drastic inference from the language of Section 1964(c), given how little consideration was afforded to the ramifications—jurisdictional and otherwise—of that section. The section was essentially an eleventh-hour addition to the statute, "was debated only briefly," and was described by Senator McClellan, the bill's co-sponsor, as a "minor change." *See* Note, *Clarifying a 'Pattern' of Confusion: A Multi-Factor Approach to Civil RICO's Pattern Requirement*, 86 Mich. L. Rev. 1745, 1767 (1988). Thus, as the Second Circuit has observed, "The most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of section 1964(c)." *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 492 (1984), *rev'd*, 473 U.S. 479 (1985).

In fact, Congress was particularly concerned that its "modeling" might later be read to limit the scope of

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[12] Petitioners rely heavily upon *Cannon v. University of Chicago*, 441 U.S. 677 (1979), to support the dual propositions that Congress is presumptively aware of the existing judicial constructions of language from prior statutes, and that it intends to incorporate those interpretations when it uses similar language in a new statute. *Id.* at 694-99. However appropriate that fiction may be as an aid to statutory construction, it is inapplicable where, as here, there is a countervailing substantive rule, bottomed on fundamental constitutional premises, that Congress must act affirmatively in order to divest state courts of their jurisdiction over federal law claims.

Moreover, in *Cannon*, the Court drew upon explicit and extensive legislative history showing that Congress intended, *in fact*, for the construction of the later statute (Title IX) to follow that of the earlier (Title VI). *Id.* at 696 & n.19. As demonstrated below, Congress expressed no such intention with respect to RICO.

RICO's remedial aims.[13] In urging that RICO be liberally construed—a principle of construction that was ultimately enacted into law—Senator McClellan emphasized that while RICO

> draws heavily upon the remedies developed in the field of antitrust . . . [t]here is, however, no intention here of importing the great complexity of antitrust law enforcement into this field. Nor is there any intention of using the antitrust laws for a purpose beyond the legislative intent at the time of their passage.

115 Cong. Rec. 9567 (1969). It was, of course, precisely these reasons that led the Court in *Sedima* to "specifically caution[] courts against employing analogies to the Clayton Act that limit the scope or availability of RICO claims." *Chivas Products*, 864 F.2d at 1288 (Krupansky, J., dissenting).[14]

b. Petitioners' reliance on *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143 (1987), is misplaced. In *Malley-Duff*, the Court was faced with designing an appropriate limitations period for RICO where Congress had not provided one. That task involved the Court in a quasi-legislative activity that is by now a familiar (though perhaps not uncontroversial) part of this Court's jurisprudence. The Court concluded that the most appropriate

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[13] Congress seems to have rejected the idea of including RICO within the existing antitrust laws in order to avoid absorbing antitrust precedent in the framework of RICO. *See* 115 Cong. Rec. 6993-95 (1969).

[14] In *Sedima*, the RICO defendants sought to limit the scope of the statute by arguing that "just as an antitrust plaintiff must allege an 'antitrust injury,' so a RICO plaintiff must allege a 'racketeering injury.'" 473 U.S. at 485. The Court rejected this argument, noting that to borrow from antitrust principles would "create [] exactly the problems Congress sought to avoid." *Id.* at 498-99. In so holding, the Court found it significant that Congress had specifically sought to avoid burdening RICO plaintiffs with "a body of precedent appropriate in a purely antitrust context." *Id.*

analogy to RICO for limitations purposes was the Clayton Act's four-year statute of limitations. This kind of gap-filling involves "fashioning remedial details where Congress has not spoken *but left matters for judicial determination within the general framework of familiar legal principles.*" 483 U.S. at 146-47 (emphasis added), *quoting DelCostello v. Teamsters*, 462 U.S. 151, 158-59 (1983). In these narrow "quasi-procedural" areas, in which *some* rule is deemed necessary, the federal courts are authorized to exercise quasi-legislative power to fill in omitted details in the statutory scheme—and to draw rough analogies to other statutes as appropriate.[15]

In the present context, by contrast, only Congress can strip the state courts of jurisdiction. The federal courts possess no similar authority. If Congress has not divested the state courts of jurisdiction, "courts are constrained to enforce the presumption of concurrent jurisdiction." *Chivas Products*, 864 F.2d at 1288 (Krupansky, J., dissenting). Indeed, it would be wholly inappropriate for the Court to undertake such a task because it would necessarily intrude upon the prerogative of the various state legislatures to define the jurisdiction of their own courts. Thus, no matter what relevance the Clayton Act analogy has for other purposes, it is beside the point with respect to the jurisdiction of state courts.[16]

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[15] Sometimes this task requires application of the most analogous state law provision (*e.g.*, *Wilson v. Garcia*, 471 U.S. 261 (1985)); on other occasions, the Court may draw from a federal analogy (*e.g.*, *Malley-Duff*, 483 U.S. at 150).

[16] For similar reasons, petitioners' analogy to the "implied right of action" cases is inapposite. *See* Pet. Br. 26-28. In that situation, as in the limitations context, there may be a limited "quasi-legislative" role for the Court to play precisely because Congress has "tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question itself." *Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring).

Even assuming the appropriateness of the analogy, however, it bears emphasis that the Court has never, to our knowledge, implied

c. Finally, the analogy to the Clayton Act ought to be rejected because when this Court, in 1922, held that jurisdiction over the antitrust laws is exclusively federal, the Court failed to take into account the presumptive jurisdiction of the state courts—and failed to apply, or even refer to, the standards set forth in *Claflin* for determining whether Congress has divested the state courts of jurisdiction. *See General Investment Co. v. Lake Shore Ry.*, 260 U.S. 261, 286-88 (1922). Thus, *General Investment* concluded that the federal courts have exclusive jurisdiction over federal antitrust claims (1) despite permissive language granting the right to bring an action in the federal courts; (2) in the absence of any discussion of evidence that Congress intended to divest the state courts of jurisdiction;[17] and (3) without evaluating whether there was any "disabling incompatibility" between the antitrust laws and state court jurisdiction.[18]

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a right of action *solely* on the basis of Congress' modeling one statute after another. *See Karahalios v. Nat'l Fed'n of Fed. Employees*, 109 S. Ct. 1282, 1287-88 (1989) (rejecting petitioner's modeling argument where there was no "evidence of [congressional] intent in the statute or its legislative history"). Rather, implication of a private right of action is warranted only where "that remedy is necessary or at least helpful to the accomplishment of the statutory purpose" (*Cannon*, 441 U.S. at 703), where such implication is supported by independent evidence of congressional intent (*id.* at 694), and where it would not frustrate state law interests to imply a private federal remedy (*id.* at 708). Those factors—which were all present in *Cannon*—are not present here.

[17] In fact, although the Court in *General Investment* did not refer to it, there is evidence in the legislative history of the Clayton Act to suggest that Congress intended to divest the state courts of jurisdiction. *See* Redish & Muensch, *Adjudication of Federal Causes of Action in State Court*, 75 Mich. L. Rev. 311, 318 (1976). Although one may question whether this evidence rises to the level of an "unmistakable implication," it may well have informed the Court's conclusion. There is, as demonstrated above, no comparable evidence in RICO's legislative history.

[18] Although the Court did not analyze the issue in *General Investment*, there may well have been reasons to deem state court

For these reasons, among others, at least two appellate panels have recently questioned the vitality of the rule of exclusive federal jurisdiction over federal antitrust claims. These cases have noted the difficulty of reconciling *General Investment* with *Claflin*, *Dowd*, and *Gulf Offshore*, and the anomaly of denying state courts the ability to hear antitrust claims, while allowing arbitration panels to do so. *See Village of Bolingbrook v. Citizens Util. Co. of Ill.*, 864 F.2d 481, 484-85 (7th Cir. 1988) (Easterbrook, J.); *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1152-53 (7th Cir. 1984) (en banc) (Posner, J.), *rev'd on other grounds*, 470 U.S. 373 (1985). Although principles of *stare decisis* may well counsel against revisiting the issue in the antitrust context, there is no reason to perpetuate the anomaly presented by the federal courts' exclusive jurisdiction over federal antitrust claims in order to carry it over to the RICO context.

C. There Is No Clear Incompatibility Between RICO And State Court Jurisdiction.

This case falls far short of presenting the type of "disabling incompatibility" (*Gulf Offshore*, 453 U.S. at 477) between state court jurisdiction and federal interests that might warrant depriving the state courts of their pre-

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jurisdiction less compatible with the federal antitrust laws. "Antitrust violations generally have a widespread impact on national markets as a whole, and the antitrust treble-damages provision gives private parties an incentive to bring civil suits that serve to advance the national interest in a competitive economy." *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2345 (1987). The antitrust laws might, therefore, be viewed as peculiarly national in character. Accordingly, the need to develop a federal antitrust jurisprudence, predicated on considerations of national economic policy, and giving substance to the remarkably open-ended legislative mandate of those laws, provides at least some support for federal exclusivity. These concerns are simply not present with respect to RICO. *See McMahon*, 107 S. Ct. at 2345.

sumptive jurisdiction. In arguing broadly that something about civil RICO is incompatible with state court jurisdiction, petitioners raise issues about the desirability of uniformity of decision and about the competence of the state courts to adjudicate federal claims. Yet these perceived problems—to the extent that they are problems, and not virtues, of our federal system—are implicated by state court adjudication of virtually any federal claim. They arise from the fact that the state courts presumptively possess concurrent jurisdiction over federal claims. These general concerns cannot mask the fact that, at bottom, the states share the federal government's interest in eradicating organized crime and in compensating its victims, that their courts are competent to adjudicate issues arising under the statute, and that RICO's remedial purposes are furthered by allowing citizens injured by organized criminal activity to bring RICO claims in their own courts as well as in the federal courts. Petitioners simply cannot bring RICO within the narrow class of cases in which constitutional concerns warrant a finding of incompatibility between a federal claim and state court adjudication of that claim.

1. As a general matter, far from being "incompatible" with state court jurisdiction, "[p]ermitting state courts to entertain federal causes of action *facilitates* the enforcement of federal rights." *Gulf Offshore*, 453 U.S. at 478 n.4 (emphasis added).[19] This is particularly so where the dominant purpose of the statute is remedial and where the legislative record indicates that Congress' intent was to *supplement*, rather than displace, existing

[19] Indeed, Congress has so arranged the limited jurisdiction of federal courts that some federal laws *can be enforced only* in the state courts. See, *e.g.*, 28 U.S.C. § 1331, conferring jurisdiction upon federal courts of civil actions arising under the Constitution, laws, or treaties of the United States only if the matter in controversy exceeds the sum or value of $10,000. *Dowd Box*, 368 U.S. at 508 n.4 (emphasis added).

remedial schemes. *See Dowd Box*, 368 U.S. at 511-12. As noted above, Congress' purposes in enacting RICO were broadly remedial—"to see that innocent parties who are the victims of organized crime have a right to obtain proper redress" [20]—and Congress intended to *supplement* the remedies that had long been available in both state and federal courts. *See, e.g.*, S. Rep. No. 617, 91st Cong., 1st Sess. 160-61 (1969). It is difficult to see how allowing RICO actions to be heard in the state courts is in any sense inconsistent with these basic objectives or, conversely, how limiting RICO's jurisdiction to the federal courts would further these goals.

In *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2345 (1987), this Court concluded that RICO's remedial objectives were promoted rather than impaired by allowing arbitral tribunals to entertain RICO actions. Indeed, the Court's inquiry in that context—whether "there is an irreconcilable conflict between arbitration and enforcement of the RICO statute" (*id.* at 2345)—is strikingly similar to the question posed here. If anything, the burden on petitioners in this case to prove a "disabling incompatibility" should be far higher given our fundamental regard for the authority of state courts within our federal system. Nevertheless, the Court in *McMahon* unanimously held that "there is no inherent conflict between arbitration and the purposes underlying § 1964(c)." *Id.* at 2345-46. *McMahon* compels the similar conclusion that there is no inherent conflict between state court jurisdiction and the purposes underlying § 1964(c).[21]

[20] 116 Cong. Rec. 35346-47 (1970) (Rep. Steiger), *quoted in McMahon*, 107 S. Ct. at 2345.

[21] To be sure, the Court has also held some claims within the exclusive jurisdiction of the federal courts to be amenable to arbitration. *See McMahon*, 107 S. Ct. at 2338-43 (Exchange Act claims held arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (federal antitrust claims

2. This Court has appeared to refer to "disabling incompatibility" in two distinct, but related, senses. On the one hand, in *Claflin*, the Court alluded to a limited class of cases in which some structural feature of the federal plan itself would counsel against state court jurisdiction. *See* 93 U.S. at 136-37. In practice, this type of "incompatibility" has been limited to cases where the federal claim at issue is a claim against the federal government, its officers, instrumentalities or creations. In these circumstances, considerations of federal sovereign immunity are incompatible with state court jurisdiction.

On the other hand, in *Gulf Offshore*, this Court appeared to refer to incompatibility in a second sense, not with reference to some inherent characteristic of the federal system, but in relation to the specific statute that Congress enacted. *See* 453 U.S. at 481-84. "Incompatibility" in this sense is no more than a restatement of the basic Supremacy Clause principle that state law that conflicts with, or frustrates, federal law, cannot stand. Thus, where the state court's exercise of adjudicative authority, in and of itself, conflicts with the purposes of the federal statutory scheme, such jurisdiction is barred.

a. One may conceive of cases in which state court jurisdiction would run afoul of the basic structure of federalism. Several early decisions of this Court held that state judges could not, consistent with the Supremacy Clause, order the discharge of someone in the custody of the federal government upon a writ of habeas corpus. *See, e.g., Ableman v. Booth*, 62 U.S. (21 How.) 506

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arising out of international commercial transactions held arbitrable). That is beside the point. Not every claim over which *Congress* chooses expressly to confer exclusive jurisdiction on the federal courts is one in which there would otherwise be a "disabling incompatibility" between the federal claim and state court jurisdiction. The "disabling incompatibility" rule is a constitutional standard. Other reasons may motivate Congress to exercise its discretion to vest jurisdiction over a claim exclusively in the federal courts.

(1858); *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871). These cases reasoned, in part, that such action would constitute a wrongful "interference" by the states with the paramount sovereignty of the federal government. Similarly, when Congress creates a statutory cause of action against the federal government, allowing suit against the federal government in a federal forum (*e.g.*, 28 U.S.C. § 1491), this would not ordinarily be construed as a cause of action that could also be pursued in the state courts—at least absent a clear statement by Congress that it so intended. The federal government's paramount sovereignty, and our historic understanding of sovereign immunity, compels that result.

Likewise, one would not expect that federal agencies would be subject to review actions, under the Administrative Procedure Act, in state court, irrespective of any explicit provision for federal exclusivity. Such suits would inevitably raise sovereign immunity concerns to the extent they required Executive Departments and agencies to account for their actions in the courts of another, and inferior, sovereign. These same concerns for overriding federal sovereignty have prompted this Court's statements that it would not expect national banks to be subject to jurisdiction in state court absent an express grant of such jurisdiction by the Congress. *See, e.g., Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 559-60 (1963); *First Nat'l Bank v. Union Trust Co.*, 244 U.S. 416, 428 (1917).

It may be that there are other situations in which an overriding federal interest, implicit in the constitutional framework itself, would divest state courts of power to adjudicate federal claims. *Cf. Gulf Offshore*, 453 U.S. at 481-82 (exclusive federal province over offshore waters does not limit state court jurisdiction). But if such circumstances exist, they are not yet apparent and certainly are not present here.

b. Similarly limited are the circumstances in which some federal statute might be found to have preempted state *adjudicative* jurisdiction. Preemption of state court adjudicative jurisdiction cannot arise from the nature of the substantive right that Congress has created: Because state courts are obliged to apply precisely the same legal standards as the federal courts, there can be no "conflict" between a federal substantive right and state court adjudication of that right.[22] State court judges are presumptively as competent to handle federal questions as are federal court judges.

An "incompatibility" of the kind that would preempt the jurisdiction of state *courts* can only arise from the peculiar nature of the federal statute's remedial scheme. Thus, where Congress has concentrated litigation for the adjudication of certain rights in a specially constituted tribunal, it might be fair to conclude that parallel state court jurisdiction would be inconsistent with Congress' purpose in establishing such a tribunal—whether that purpose be uniformity of decision or the development of special adjudicative expertise. For example, in *Garner v. Teamsters*, 346 U.S. 485, 490 (1953), this Court held, in language that petitioners quote (Pet. Br. 30-31), that a state court (or a federal court for that matter) could not adjudicate a controversy that fell within the jurisdiction of the National Labor Relations Board, "a specific and specially constituted tribunal" for which "a particular procedure" was prescribed "for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order." *Garner* exemplifies those cases where Congress makes it clear that it intends for all decisions to emanate from a specific tribunal.

[22] Federal preemption of state legislative power—*i.e.*, the state's "political jurisdiction" (*Gulf Offshore*, 453 U.S. at 480)—will not by itself operate to divest state court jurisdiction. *Id.* at 480-82.

Petitioners' effort to draw an analogy between the National Labor Relations Act as expounded in *Garner* and RICO is misguided. There *might* be an analogy if, for example, Congress had assigned adjudication of claims under RICO, not to *any* federal court, but to a single district court and required that court to accord such claims a special priority: In that circumstance, it might be reasonable to infer that Congress intended to focus adjudication in a single court in order to develop uniformity, foster expertise, and expedite consideration of such claims. In such situations, the goal of federal uniformity or expertise is not merely an unexpressed policy preference to be read *into* the statute by the Court, but an affirmative congressional mandate, embodied in a statutory procedure, and with which a state court's assertion of jurisdiction would arguably be incompatible.

c. None of the foregoing considerations are present with respect to RICO. RICO is not a statute that implicates any concerns about federal sovereign immunity. Nor is RICO a statute under which Congress specially constituted or ordained some judicial or administrative tribunal to ensure the development of a uniform or expert jurisprudence.[23] On the contrary, RICO is as amenable to state court adjudication as it is to resolution in the

[23] As the court noted in *United States v. Turkette*, 452 U.S. 576, 586 n.9 (1981), in enacting RICO, Congress specifically directed that "[n]othing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title." 84 Stat. 947. Laws by which Congress seeks to expand upon available state remedies rather than preempting them are particularly appropriate for resolution in a state forum—especially when the subject area is one which has previously been under the exclusive control of the states. When Congress specifically disclaims any intention to wrest control of the problem from the states, and instead implies that federal and state law should work together to deal with the problem, it would be anomalous to conclude that Congress intended to deprive the states of the ability to enforce the federal remedy.

federal courts. That all of the state high courts to have reached this issue have found themselves competent to entertain such claims confirms this point. *See Simpson Elec. Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, 530 N.E.2d 860 (1988); *Rice v. Janovich*, 109 Wash.2d 48, 742 P.2d 1230 (1987); *Cianci v. Superior Court*, 40 Cal.3d 903, 710 P.2d 375 (1985).

3. One law review article, cited by petitioners (Pet. Br. 13), has urged the Court to use the "incompatibility" test to engage in "creative judicial lawmaking" that would look to "the practical needs of the federal system as perceived by the court." Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 Mich. L. Rev. 311, 329 (1976). Under this suggested approach, "when Congress is silent on the question of concurrent jurisdiction, a court may examine the potential impingement on important federal interests and programs that might result from their consideration by state judges who lack sufficient background, expertise or—on occasion—competence to deal with these uniquely federal concerns." *Id.*

Such an approach to "incompatibility," we submit, is at odds with *Claflin* and its origins. It trivializes the principle that state courts possess inherent authority over federal claims and effectively grants the federal courts a lawmaking power as respects the jurisdiction of the state courts. Whether state courts *should* be ousted from their jurisdiction is not a determination that the federal courts should have authority to decide. Because ouster of state court jurisdiction is something that can be achieved only through the enactment of a statute, there is neither room nor a need for "creative judicial lawmaking." In short, the premises of such an analysis are inconsistent with this Court's traditional approach to the problem.

In *Gulf Offshore*, this Court referred to the kind of factors that might be relevant to such a "creative judicial lawmaking" analysis. *See* 453 U.S. at 483-84 & n.13

(citing Redish & Muench). In so doing, however, the Court did not endorse an expansive notion of "incompatibility." Instead, the Court simply sought to demonstrate that the petitioners in *Gulf Offshore* had failed to present a persuasive case even under that generous standard. The same is true of petitioners' argument here.

Petitioners make three arguments in support of their incompatibility thesis: (a) that there is a need to interpret RICO uniformly and consistently, and that state court jurisdiction would undermine this objective (Pet. Br. 33-35); (b) that "[a]llowing state courts to adjudicate civil RICO claims, including the necessarily attendant interpretation and construction of federal criminal statutes as applied to the facts of each case," would be "inconsistent with the express intent of Congress that the federal courts alone should adjudicate federal criminal law" (Pet. Br. 11, 29-33); and (c) that RICO's procedural mechanisms "are inconsistent with any assertion that the fifty state courts should have concurrent jurisdiction" (Pet. Br. 11, 36-37). Each of these arguments is without merit.

a. Petitioners' contention that state court jurisdiction is at odds with an asserted need for uniformity overlooks several important points. *First*, Congress is well equipped to ensure uniformity and consistency when it thinks these attributes important to the construction of federal law: For example, it can limit jurisdiction to only certain specified courts (*e.g.*, 42 U.S.C. § 1973(c) (Voting Rights Act)); it can create specialized tribunals to have primary responsibility for the development of federal law in certain areas (*e.g.*, 28 U.S.C. §§ 1491 (Claims Court), 1295 (U.S. Court of Appeals for the Federal Circuit)); or it can expressly confer exclusive jurisdiction on the federal courts (*e.g.*, 28 U.S.C. §§ 1333 (admiralty), 1338 (patent and copyright)). Congress elected none of these options in enacting RICO. There is simply no evidence that Congress regarded uniformity to be any more essential to RICO than to any other federal statute.

Indeed, the claimed need for uniformity is particularly weak with respect to RICO. Because all of the conduct to which RICO attaches criminal penalties and civil liability is already criminal conduct, it could not seriously be argued that lack of uniformity will

> confuse efforts to conform conduct to law nor threaten disappointment of legitimate expectations as might result from varying interpretations of the antitrust laws. As to the antitrust laws, which involve the prohibition against certain modes of conducting otherwise lawful businesses, there might be considerable confusion and harm to the legitimate business world if the prohibitory scheme were interpreted in different ways by different court systems. Such danger justifies the exclusive federal jurisdiction. RICO is fundamentally different. RICO does not criminalize otherwise lawful conduct. It merely attaches new consequences to traditionally criminal conduct.

Ritchie v. Carvel Corp., No. 87 Civ. 8856 (S.D.N.Y. June 20, 1989) (available on WESTLAW). Thus, whatever the need for uniform interpretation under the antitrust laws, where businessmen need to be able to understand the law in order to make legitimate business decisions, there is little or no such need under RICO.

Second, uniformity is not, in any case, the overriding goal of our system of concurrent state and federal jurisdiction. That "diversities and conflicts" may occur in the construction of federal law is "no more than the usual consequence of concurrent state and federal jurisdiction over cases arising under federal law. To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court." *Dowd Box*, 368 U.S. at 514.[24] State courts are no less able to follow the law

[24] Even with respect to this Court's appellate jurisdiction over state court judgments, uniformity concerns have not historically been of paramount importance. As Professor Gunther has explained:

> The Judiciary Act of 1789 did *not* grant to the Court all of the potential article III appellate jurisdiction, even in constitutional cases, necessary to assure that the Supreme Court would be the ultimate provider of both supremacy and uniformity. Rather, section 25 of the Act, dealing with review of state court decisions, was essentially a supremacy-assuring device; it was *not* primarily concerned with uniformity. Supreme Court review was available only when a state court denied a federal claim; when the state court sustained a federal claim, even when its reading of federal law differed from that of federal tribunals, review was unavailable. Such was the scheme of the jurisdictional statutes for more than a century, until 1914.

Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 906-07 (1984).

as laid down by this Court than are the many judges of the federal court system in the twelve judicial circuits.

More important, some "diversities and conflicts," at least in the first instance, are "not necessarily [an] unhealthy prospect." *Dowd Box*, 368 U.S. at 514. One of the virtues of allowing state court judges to pass upon federal law claims is that, on occasion, they may be able to bring unique knowledge, perspective and experience to difficult legal questions. This may be especially so in an area, like RICO, that historically has been within the province of state law. For example, the state courts, drawing upon established state law precedent, may well have something important to contribute to the development of a meaningful definition of a "pattern of racketeering activity" that has so far eluded the federal courts. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989). And if they ultimately do not, they are no less competent than federal judges to follow any guidance provided by this Court.

b. Petitioners' second argument, attributing jurisdictional significance to the fact that RICO's civil provisions

relate directly to its criminal components, was rejected by this Court in *McMahon*. 107 S. Ct. at 2344. The McMahons urged that "the 'overlap' between RICO's civil and criminal provisions renders § 1964(c) claims non-arbitrable." *Id.* The Court disagreed. Reiterating its repudiation of the view that § 1964(c) "provide[s] civil remedies for offenses criminal in nature," (107 S. Ct. at 2344, *quoting Sedima*, 473 U.S. at 492), the Court found no inconsistency between RICO and adjudication by arbitration.[25]

It would be incongruous to suppose that Congress would permit an arbitration panel to hear RICO claims, despite the criminal dimensions of the statute, but would for this reason deny jurisdiction to the state courts. The state courts are, after all, considerably more experienced in interpreting criminal law, including federal criminal law,[26] than are most arbitration panels. Moreover, to the extent it is at all unusual for the courts of one sovereign to interpret the criminal laws of another, it is just as

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[25] There is, of course, no inherent inconsistency between state court jurisdiction over federal civil actions that have federal criminal counterparts. For example, 42 U.S.C. §§ 1983 and 1988, which provide a cause of action for the deprivation of federal rights, have a criminal counterpart. *See* 18 U.S.C. § 242. But that has not been viewed as any bar to state court jurisdiction over § 1983 claims.

[26] There is nothing in our system of dual sovereignty to preclude state court resolution of federal criminal law issues. Although Congress has, as a general rule, expressly given the federal courts exclusive jurisdiction over federal criminal law (*see* 18 U.S.C. § 3231), there have been occasions where the state courts have enjoyed concurrent jurisdiction over federal criminal statutes. *See generally* Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545 (1925).

Indeed, the fact that the first Congress felt compelled to pass a statute expressly vesting exclusive jurisdiction in the federal courts over federal criminal offenses only confirms the fact that, in the absence of such a statute, the state courts would have jurisdiction over federal criminal offenses.

unusual for the federal courts to be construing RICO's *state* criminal law predicate acts as it is for the state courts to be applying federal criminal law. No one would seriously suggest that federal court unfamiliarity with state crimes has hampered federal court RICO enforcement. Finally, it is simply not true that state judges are unfamiliar with the construction of RICO's federal predicate acts since many state "little RICO" laws incorporate these same federal predicate acts in their definitions of "racketeering activity." [27]

Petitioners also dramatically overstate the "complexity" of interpreting RICO's predicate offenses. This aspect of RICO's jurisprudence has engendered little controversy in either the federal or state courts. *See Simpson Elec. Corp.*, 530 N.E.2d at 865.[28] This is hardly surprising. In general, even those RICO predicate offenses that are federal are only nominally so. *See Chivas Products*, 864 F.2d at 1289 (Krupansky, J., dissenting). As one commentator noted, "RICO lets civil plaintiffs sue in federal court for treble damages based on conduct that historically had been within the exclusive jurisdiction of state courts under common law principles of tort or contract law." *Id.*, *quoting* Cole & McNamara, 12 *Litigation* 24, 25 (Spring 1986). "If anything, RICO involves federal courts in the adjudication of state law claims rather than the other way around." *Lou*, 834 F.2d at 738. *See also United States v. Turkette*, 452 U.S. 576, 586-87 (1981) (criminal RICO moves "large substantive areas formerly totally within the police power of the State into the Federal realm.")

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[27] *See, e.g.*, N.J. Stat. Ann. § 2C:41-1a(2) (defining predicate acts to include "any conduct defined as 'racketeering activity' under Title 18, United States Code, s. 1961(1)(A), (B) and (D)"); Ohio Rev. Code Ann. § 2923.31(I)(1) (same).

[28] The adjudication of a RICO claim "seldom require[s] sophisticated analysis of the underlying federal statutes, for most disputes concerning predicate acts are purely factual." *Brandenburg*, 859 F.2d at 1195.

c. Finally, petitioners argue that state court jurisdiction is incompatible with RICO because the statute provides for enforcement of RICO in federal court by federal officials (Pet. Br. 36). Petitioners also argue that because the venue and process provisions of the statute only apply in federal court, they constitute evidence that Congress intended that RICO actions could be maintained only there. (*Id.*) Neither of these arguments supports the conclusion that state court adjudication is incompatible with RICO.

First, the fact that Congress has provided for the enforcement of a federal statute by federal officials is not surprising. It is entirely customary for the federal government to prosecute actions in the federal rather than state courts. This says nothing about where a private citizen may bring a private enforcement action. *Brandenburg*, 859 F.2d at 1194; *Lou*, 834 F.2d at 738 n.7. It is, in any case, difficult to see how concurrent jurisdiction over a private claim would be "incompatible" with government enforcement of the statute in federal courts.

Second, the fact that Congress elected to prescribe certain procedural rules for the enforcement of RICO actions in federal court is neither unusual nor relevant here since the states generally retain the authority to promulgate procedural rules for their courts even where the right being asserted derives from federal law.[29] Thus, in *Dowd Box*, this Court had no difficulty holding that there is concurrent jurisdiction over Labor Management Relations Act § 301(a) suits despite the presence of federal enforcement and venue provisions similar to those in RICO. *See* 368 U.S. at 503 n.1. *See generally Simpson Elec. Corp.*, 530 N.E.2d at 865; *Chivas Products*, 864 F.2d at 1291 (Krupansky, J., dissenting). Similarly, the

[29] "The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954).

cause of action provided by 42 U.S.C. § 1983, and the right to attorneys' fees provided by § 1988, are available in state court (*see Maine v. Thiboutot*, 448 U.S. 1 (1980)) despite the fact that § 1988 itself provides very specific procedures for the conduct of federal court proceedings.

4. Concurrent jurisdiction ordinarily prejudices neither plaintiffs nor defendants. The existence of concurrent jurisdiction will not, of course, affect the right of either party to have his case heard on the merits. Moreover, in the ordinary case, neither party will even be deprived of the right to choose the *federal* forum if he so wishes. As this Court pointed out in *Gulf Offshore*, "[e]xclusive federal-court jurisdiction over a cause of action [] is unnecessary to protect the parties. The plaintiff may choose the available forum he prefers, and the defendant may remove the case if it could have been brought originally in a federal court. 28 U.S.C. § 1441(b)." 453 U.S. at 483 n.12.

In this case, however, the decision whether to allow the state courts jurisdiction does matter both to the parties and to our federal system. That is because the courts below concluded that Maryland's comprehensive approach to its savings and loan crisis, implemented through the state courts, required the federal courts to abstain from the exercise of their jurisdiction in order to avoid interference with the state plan. *See Brandenburg*, 859 F.2d at 1191-92. The courts below found this case to be one in which the state courts are far *better* equipped than the federal courts to hear the entirety of some controversy—in a context where resolution in a single forum (rather than piecemeal in two courts) represented the most practical way to proceed. No one has, or could, challenge the lower courts' conclusion that this is a compelling case for abstention.

As this case illustrates, therefore, the *only* situation in which a determination that jurisdiction is not concurrent

will have any material significance on the conduct of a litigation is where the unique circumstances of the case, and concerns for our federal system, combine to compel the conclusion that the state courts, and not the federal courts, *should* have jurisdiction of the case. Nothing about RICO, and nothing in the precedents of this Court, provides a basis upon which this Court might reach that odd result in this case.

CONCLUSION

The judgment of the Fourth Circuit should be affirmed.

Respectfully submitted,

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